IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1192

DONALD GOLDSTEIN, RUTH KOVEN and DONALD KOVEN,

Petitioners,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Appellate Department, Superior Court of California, County of Los Angeles.

BRIEF OF PETITIONERS.

ARTHUR LEEDS,
PAUL T. LOCKE,
DANIEL M. GOTTLIEB,
Attorneys for Petitioners.

GOTTLIEB, LOCKE & LEEDS,
9229 Sunset Blvd.
Suite 306,
Los Angeles, Calif. 90069,
(213) 278-3232,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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BRIEF OF PETITIONERS.

Opinion Below.

The opinion of the Appellate Department of the Superior Court of the County of Los Angeles, State of California, has not been published.

Jurisdiction.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles in the instant matter, is set out at Appendix A to the Petition for a Writ of Certiorari in the instant case[1] and was entered on November 12, 1971.

A timely petition for rehearing or in the alternative transfer to the Court of Appeal was filed November 16, 1971.

[1]Hereinafter referred to as the "Petition".

An order denying rehearing and granting Certification was entered on November 30, 1971, and is set out at Appendix B to the Petition. The "Order Certifying Cause to the Court of Appeal", which sets out the question presented to said Court, was also entered November 30, 1971 and a copy of said order is set out at Appendix C to the Petition.

The Order denying such transfer was entered by the Court of Appeals, State of California, Second Appellate District, Division 2, on December 16, 1971, and filed on said date, and a copy of said order is set out at Appendix D to the Petition.

Jurisdiction to review the proceedings in the Court below is conferred on this Court by Title 28 U.S.C. § 1257(3).

Question Presented.

The following question is presented for review by this Court:

> "May the State of California, through its criminal laws, grant copyright protection for unlimited times to sound recordings in the Public Domain, in direct conflict with Article I, §8, Clause 8 of the United States Constitution and the implementing Federal Copyright laws and policy."

Constitutional and Statutory Provisions.

This case involves the following Constitutional and Statutory provisions:

1. Article I, §8, Clause 8 of the Constitution of the United States, which provides as follows:

> "Congress shall have power . . . To promote the Progress of Science and Useful Arts, by securing

for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

2. Title 17, United States Code, Sections 1 (e), 1 (f), 2 and 101 (e).

3. California Penal Code §653h which provides as follows:

"(a) Every person is guilty of a misdemeanor who:

"(1) Knowingly and willfully transfers or causes to be transferred any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, such article on which such sounds are so transferred, without the consent of the owner.

"(2) Sells any such article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.

"(b) As used in this section, 'person' means any individual, partnership, corporation or association; and 'owner' means the person who owns the master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is recorded, and from which the transferred recorded sounds are directly or indirectly derived.

"(c) This section shall neither enlarge nor diminish the right of parties in private litigation.

"(d) This section does not apply to any person engaged in radio or television broadcasting who

transfers, or causes to be transferred, any such sounds (other than from the sound track of a motion picture) intended for, or in connection with, broadcast transmission or related uses, or for archival purposes."

Statement of Case.

This case involves the clearly drawn, important question, of whether a state may use its criminal laws to prohibit the copying of items, here sound recordings, which have neither a valid Federal copyright nor patent, and which have been sold in large numbers on the open market. In the instant case the petitioners were arrested and charged in a misdemeanor complaint with 14 separate violations of California Penal Code §653h (Appendix at 1[2]).

The specific charges each alleged that on or about March 3, 1971, and continuously for a period of 11 months immediately prior thereto, the defendants (petitioners), each knowingly manufactured, or sold, prerecorded tapes copied ("transferred") from certain musical sound recordings without the consent of the specific record company which owned the rights to the master recording of such copies sound recordings. (A. at 15-23).

The petitioners, in order to produce such copied tapes, first purchased, on the open market, a so-called "authorized factory" tape from a "retail outlet" (A. at 41). The purchased tape was then copied electronically, and the copy was wrapped, labeled and shipped "to persons all over the country."[3] (A. at 41-42).

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[2]Hereinafter cited as ("A").

[3]A more detailed description of the method of copying used by petitioners can be found at *Tape Industries Association of*

The question here sought to be reviewed, that is, the constitutionality of the California Copyright Statute (*sub noma* California Penal Code §653h), which statute purports to make petitioners' act of copying and selling a crime, was raised at the very outset of this case. The petitioners moved to quash the search warrant and to have all the property seized thereunder returned on the grounds, *inter alia,* that California Penal Code §653h conflicts directly with Article I, §8, Clause 8 of the United States Constitution and the implementing Federal Statutes because (1) it establishes a State copyright; and (2) it prohibits copying of public domain matter for unlimited times (A. at 24-25).

America v. Younger, 316 F. Supp. 340 (C.D. Cal. 1970), *appeal denied,* 401 U.S. 902 (1971) *appeal pending* U.S. Ct. App. 9th Cir., No. 26,628 (hereinafter referred to as "*TIAA v. Younger*"). The respondents herein quote extensively from that case in their Brief in Opposition to Certiorari (p. 6-8) and they correctly point out that one of the petitioners in the instant case (Donald Koven) is one of the plaintiffs (appellants) in *TIAA v. Younger.* In *TIAA v. Younger* the Court noted that a label, containing the following information, as well as the name of the recording, and the name of the performer, was affixed to the copied tapes:

> "No relationship of any kind exists between [petitioners] and the original recording company nor between this recording and the original recording artist. This tape is not produced under a license of any kind from the original company nor the recording artist(s) and neither the original recording company nor artist(s) receives a fee or royalty of any kind from [petitioner]. Permission to produce this tape has not been sought nor obtained from any party whatsoever." 316 F. Supp. at .....

Petitioners contend that such a label removes any possible contention that they are "palming off" their product as another's and thereby causing confusion as to the source of the product. In any event, the statute in question is not a "labeling statute" since a crime is purportedly committed under Cal. Penal Code §653h even if, as in the instant case, there is no allegation (or proof) of confusion as to the source of the product. The purported crime is the act of copying (or the sale of such copies) of an uncopyrighted sound recording which has already been sold and fully commercially exploited by its "originators."

The petitioners also then moved to quash the search warrant on the further grounds that California Penal Code §653h was in direct conflict with this Court's decision in *Sears, Roebuck and Co. v. Stiffel Co.*,[4] and *Compco Corp. v. Day-Brite Lighting, Inc.*[5] The trial court denied the petitioners' Motion to quash and held that the Search Warrant was valid. (A. at 25).

Petitioners, through their attorney, then made a motion to dismiss the complaint on the grounds set out above with respect to the motion to quash the search warrant (A. at 26-27). Again the court denied the motion (A. at 27).

The petitioners, after preserving their right to appeal under California law,[6] pleaded *nolo contendere* to ten counts of knowingly manufacturing or knowingly selling such copied sound recordings (A. at 6) and were then each sentenced under Count 1 to six months in the County jail, sentence suspended and given summary probation for three years (A. at 8-10). The terms of the probation required that petitioners Donald and Ruth Koven each pay a fine of $500.00 or serve 100 days in the County jail (A. at 8-10) and that petitioner Goldstein pay a fine of $100.00 or serve 20 days in the County Jail (A. at 10). On Counts two through ten, the sentence was, as to each petitioner, $500.00 or 100 days, and the sentence was suspended (A. at 8-10). Under the

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[4]376 U.S. 225 (1964), hereafter referred to as "Sears".

[5]376 U.S. 234 (1964), hereafter referred to as "*Compco*".

[6]California Penal Code Section 1237.5.

terms of the probation the petitioners are required to refrain from the making of further copies of sound recordings, or selling such copies without "the consent of the owner of the original" (A. at 8-10). The remaining counts were dismissed.

Thereafter on appeal the petitioners again raised the question of the constitutionality of Section 653h (Petition at Appendix A). The Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the trial court's decision on the basis of *TIAA v. Younger* and *Capitol Records, Inc. v. Erickson*[7] (Petition at Appendix A). The petitioners then moved to have the case transferred to the California Court of Appeals to decide the constitutionality of Penal Code Section 653h (A. at 14). The Superior Court, Appellate Division, certified the transfer of the case to the Court of Appeals on the grounds that it was "necessary to settle an important question of law", to wit, "Is Section 653h of the California Penal Code constitutional?" (Petition at Appendix C.)

The Court of Appeals, without opinion, ordered that such transfer be denied, and under California law the petitioners had thereby exhausted all their State Court appeals. The petitioners then filed with this Court a Petition for a Writ of Certiorari to the Court below and said Petition was granted.

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[7]2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969).

Summary of Argument.

California may not use its Criminal laws to prohibit the copying of sound recordings fixed or published prior to February 15, 1972, which recordings have been intentionally denied copyright protection by Congress.

1. California Penal Code § 653h attempts to prohibit the copying of all sound recordings including those which have been denied copyright protection by Congress. The protection granted by California to those recordings denied protection by Congress (recordings fixed or published prior to February 15, 1972), is even greater than the copyright protection afforded by Congress in the recently enacted amendments to the copyright law (PL 92-140) to those recordings fixed and published after February 15, 1972 (but before January 1, 1975). That is, the California law grants protection in perpetuity, while the federal protection is only for a limited time.[8] Further, the federal law establishes elaborate notice and registration requirements[9] while the state statute contains no notice or registration requirements. The state statute thus conflicts with the federal copyright laws and Article I, Section 8, Clause 8 of the Constitution.

2. The states have relinquished their power in copyright matters to the federal government, and there can be no question as to federal supremacy in the field of copyrights. *Gibbons v. Ogden*, 9 Wheaton 1. Any in-

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[8]Title 17 U.S.C. § 24.

[9]Title 17 U.S.C. §§ 10, 13, 14, 19, 20, 30, 31.

terference by state law with the Constitutional and Congressional intent to establish a uniform national copyright law, or any conflict between federal and state laws relative to items that are constitutionally the subject of copyright can not be tolerated under the Supremacy Clause. *Sears*[10] and *Compco.*[11]

3. California Penal Code § 653h constitutes just such an interference with federal copyright law because it seeks to prohibit the copying of uncopyrighted sound recordings which have been sold in large quantities to the public. Such sales constitute "publications" of the performances embodied on the sound recordings and places such performances in the public domain. They may therefore be copied by anyone, in any manner. The general public has a deep interest in the enforcement of this right to copy, since the California statute if enforced by this Court will establish monopoly rights and powers in certain record companies at the expense of the general public and the petitioners herein.

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[10]376 U.S. 225.

[11]376 U.S. 234.

ARGUMENT.

A. Sound Recordings Fixed or Published Prior to February 15, 1972, Have Been Intentionally Denied Copyright Protection by Congress.

Congress has specifically, and repeatedly, refused to grant copyright protection to sound recordings fixed or published prior to February 15, 1972. The House Report[12] which accompanied the bill that became Title 17 U.S.C. § 1(e)—before it was amended by Public Law 92-140—stated immediately following the discussion of Section 1(e):

> *"It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves,* but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices."[13] (Emphasis added.)

Further, no less than 31 bills had been unsuccessfully introduced in Congress between 1909 and 1951, which if enacted, would have provided copyright protection to sound recordings fixed and published prior to February 15, 1972.[14] On one such occasion in 1930

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[12]Report of Committee on Patents, H.R. Rep. No. 2222, 60th Cong. 2d Sess. at p. 10.

[13]In *Capitol Records v. Mercury Records Corp.*, 221 F. 2d 657, 661 (2d Cir. 1955) the Court referred to this language as the "actual intent" of Congress, and noted:

> "This [is an] express disclaimer of intention to extend the right of copyright to the mechanical reproductions themselves . . . . "

[14]Staff of Subcomm. on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary 86th Cong., 2d Sess. *The Unauthorized Duplication of Sound Recordings* [7 Comm. Print. 1961] (Study No. 26, by Barbara Ringer) 21-37.

(during the Seventy-First Congress, second session), a bill, HR 12549, was reported favorably by the Committee on Patents.[15] That bill contained a provision, at paragraph "(q)", listing sound recordings as one of the classes of copyrightable works, thereby granting full copyright protection to such sound recordings.

The Committee on Patents reported HR 12549 favorably, with paragraph "(q)" intact. However, when the bill reached the floor of the House, that paragraph was stricken by unanimous consent upon the request of the chairman of the committee which reported the bill.[16] The bill without paragraph "(q)" was then passed by the House and the Senate. The action taken by Congress on HR 12549, as well as the Congressional action taken on the copyright law enacted in 1909 and on the numerous attempts to amend the copyright law prior to Public Law 92-140, are clear expressions of the Congressional will to refuse recordings fixed or published prior to February 15, 1972, even the limited monopoly protections of copyright.

B. Public Policy Requires, and This Court Has Repeatedly Held, That Public Domain Items Unprotected by Patents or Copyright May Be Copied by Anyone.

In its decisions in *Sears* and *Compco* this Court held that there was an important public policy, and a Congressional intent,[17] to establish a uniform nation-

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[15]H.R. Rep. No. 1689, 71st Cong., 2d Sess. (1930); H.R. Rep. No. 1898, 71st Cong., 2d Sess. (1930); and H.R. Rep. No. 2016, 71st Cong., 2d Sess. (1930).

[16]74 Cong. Rec. 2034 (1931).

[17]"The purpose of Congress to have national uniformity in patent and copyright laws can be inferred from such statutes

(This footnote is continued on next page)

al copyright law[18] which would protect the general public[19] against unwarranted State created monopolies by allowing all to copy that which is in the public domain.

> "Today we have held in *Sears, Roebuck & Co. v. Stiffel Co., supra,* that when an article is unprotected by patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Article I, Section 8, Clause 8, of the Constitution, and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain. Here Day-Brite's fixture has been held not to be entitled to a design or mechanical patent. Under the federal patent laws it is, therefore, in the public domain and can be copied in every detail by whoever pleases."[20] *Compco, supra,* 376 U.S. at 237-38.

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as that which vests exclusive jurisdiction to hear patent and copyright cases in federal courts, 28 U.S.C. § 1338(a), and that section of the Copyright Act which expressly saves state protection of unpublished writings but does not include published writings, 17 U.S.C. § 2." *Sears, supra,* 376 U.S. at 224-25.

[18]"Thus the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition." *Sears, supra,* 376 U.S. at 231. Of course the copyright law also protects the general public against perpetual monopolies by requiring that all items protected by patents or copyrights eventually go into the public domain. State laws, such as California Penal Code §653h have no such protection against monopolies because they grant protection in perpetuity.

[19]In *Sears* the Court held that the public was "deeply interested" in making certain that unprotected items could be copied freely (376 U.S. at 231-32).

[20]Of course neither *Sears* nor *Compco* would prohibit the States from preventing the "palming off" of items. That is, a State through its Civil or Criminal law, could require adequate labeling to insure that the public is not confused as to the source of the item being sold. However, California Penal Code § 653 is definitely not such a labeling statute.

In the instant case, as Petitioners have shown, Congress has deliberately denied pre-February 15, 1972, sound recordings even the limited protection of copyright. Congress has, however, granted to certain sound recordings fixed and published subsequent to February 15, 1972, a limited copyright. That is, the federal copyright is limited in time to twenty-eight years (plus a similar renewal period) and to the prohibition of a certain "kind" of copying. That kind of copying is the exact kind of copying California Penal Code § 653h seeks to prohibit. Thus the California statute attempts not only to extend the monopoly protection granted by the federal copyright law into the future—to recordings fixed or published after February 15, 1972—but also into the past—to recordings fixed or published prior to February 15, 1972.[21]

In addition the California statute seeks to extend, in perpetuity,[22] the otherwise limited life of the Federal copyright, since the statute would prohibit the copying of sound recordings even after the federal limited copyright has expired.

This Court rejected a similar attempt to establish State copyright laws, when it held:

> " '*Sharing in the good will of an article unprotected by patent or trademark is the exercise of a right possessed by all—and in the free exercise*

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[21]Stated in another way, the California Penal Code § 653h seeks to remove from the public domain those sound recordings fixed or published prior to February 15, 1972. However, in *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) this Court held:

> "Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge in the public domain, or to restrict free access to materials already available."

[22]California Penal Code § 653h is thus in direct conflict with Article I, Section 8, Clause 8, of the Constitution, which requires copyrights to be for "limited times" only.

> *of which the consuming public is deeply interested'* [citation]. To allow a state by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. The result would be that while federal law grants only 14 to 17 years' protection to genuine inventions, States could allow perpetual protection to articles too lacking in novelty to merit any patent at all under federal constitutional standards. This would be too great an encroachment of the federal patent system to be tolerated." *Sears, supra*, at 231-32.

Petitioners contend that the above establishes that the holdings of this Court in *Sears* and *Compco* are dispositive of the issues in this case. That is, California Penal Code Section 653h is unconstitutional because it prohibits, for unlimited times, items which under paramount federal law, have been left in the public domain.

Petitioners' position is in accord with the position expressed by the United States Department of Justice,[23] and has recently been accepted by a United

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[23]The United States Department of Justice, by the Deputy Attorney General, filed an opinion letter with the House of Representatives Committee studying Senate Bill 646, which eventually became PL 92-140. (Hearings on S646 and H.R. 6927, House of Representatives Comm. on the Judiciary, Subcomm. No. 3, 92nd Cong., 1st Sess. (1971) at pp. 121-123.) The letter states that under existing law sound recordings are not copyrightable; that the record industry has been able to fashion some protection "against competitors who commercially transcribe their recorded performances, based upon the misappropriation theory of *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918)"; and that "the Court of Appeals for the First Circuit has held that *Sears* and *Compco* overruled *International News*

States District Court.[24] However, the Court below, and respondent herein, attempts to distinguish the holdings and reasoning of this Court in *Sears* and *Compco*, on two principal grounds. It is first alleged that sound recordings, despite the fact that they are fully exploited by their originators, are not "published" and are therefore not in the public domain. It is also argued that even if they are published, California Penal Code § 653h does not prohibit their "copying." Neither argument is correct.

C. Sound Recordings Sold to the Public Have Been "Published" and Are in the Public Domain.

The respondent has consistently taken the position that the sale and distribution of countless copies of sound recordings do not constitute a publication of the performances contained on the recordings,[25] and that California is thus free to protect such recordings as "unpublished" works under Title 17 U.S.C. § 2.[26]

Service. Columbia Broadcasting System, inc. v. De Costa, 377 F. 2d 315, 318 (C.A. 1)."

The Justice Department then states in the letter:

"We believe that extending copyright to recordings is the soundest, and in our interpretation of *Sears* and *Compco*, *the only way* in which sound recordings should be protected. Copyright protection is narrowly defined and limited in duration, whereas state remedies, whose validity is still in doubt, create broad and unwarranted perpetual monopolies." (Emphasis added.)

The above quotation is a clear statement of support by the Justice Department for Petitioners' position in the instant case.

[24]*International Tape Manufacturers Association v. Gerstein*, ... F. Supp. ....., (S.D. Fl. 1972, No. 72-164-Civ-JE).

[25]Respondents Brief at 14-16.

[26]That section provides:

"Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

In fact, it is fair to say that this contention is the core of respondent's argument.

However, the respondent is and must be wrong, for it is fundamental to a policy of maintaining a uniform national copyright law that the determination of what constitutes publication must be made according to federal standards.[27] To hold otherwise would allow each state to pick and choose where it desired to grant greater protection than the federal copyright laws. If California with a large recording industry can hold that the sale of even a million copies of a record is not a "publication", could not New York with a large book publishing industry hold that the sale of even a million copies of a book is not a publication and thus grant authors state protection greater than they receive under federal copyright laws?

Petitioners submit that federal standards of publication must be applied and that under such standards sound recordings have clearly been published. The leading case directly expressing the *federal rule* with respect to publication of sound recordings is *RCA Mfg.*

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[27] *Capitol Records v. Mercury Records, Corp.*, 221 F.2d 657, 667 (2d Cir. 1955) (Judge Learned Hand dissenting). The "standards" California seeks to substitute are very simple. That is, the State alleges that there is not, and can not, be a publication of sound recordings. However, federal law (Title 17 U.S.C. § 26) defines "publication", for purposes of the copyright extended to post-February 15, 1972, sound recordings, as follows:

> "In the interpretation and construction of this title 'the date of publication' shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority . . . "

Petitioners suggest that there is little doubt but that any fair reading of Title 17 U.S.C. § 26 compels a finding that the sound recordings California seeks to protect as "unpublished", are in fact "published" under Federal law.

Co., Inc. v. Whitman, 114 Fed. 86, 89 (2d Cir. 1940). In that case Judge Learned Hand, writing for a unanimous court, held:

> "We think that the 'common law property' in these performances ended with the sale of the records. . . ."

The Court then addressed itself directly to the question of whether sound recordings could be protected under state common law[28] and reasoned:

> "[W]e see no reason why the same acts that unconditionally dedicate the common law copyright in works copyrightable under the Act, should not do the same in the case of works not copyrightable. Otherwise it would be possible, at least pro tanto, to have the advantage of dissemination of the work at large, and to retain a perpetual though partial, monopoly in it. That is contrary to the whole policy of the Copyright Act under the Constitution. Any relief which justice demands must be found in extending statutory copyright to such works, not in recognizing perpetual monopolies, however limited in their scope." *R.C.A., supra*, at 89.[29]

In a more recent decision, a federal court held unconstitutional and permanently enjoined enforcement of a Florida statute almost identical to California Penal Code § 653h. In *International Tape Mfg. Assoc.*

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[28]Petitioners are not aware of any policy or reason which would allow a State to grant sound recordings State statutory protection while denying a State the right to grant sound recordings protection under the common law.

[29]See also *Gantz v. Harris*, 98 F. Supp. 906, 910 (S.D.N.Y. 1951) aff'd (with approval on this point) and modified (on other grounds) 198 Fed. 585 (2d Cir. 1952); *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681 (S.D. Cal. 1958)

v. Gerstein,[30] the Court, in an opinion by Judge Layton, held:

> "Therefore, this Court holds that authorized dissemination of recorded sounds manufactured from a master disc constitutes a 'general publication' of both the underlying composition and the performance sufficient to deprive the owner of any common law copyright to which he might be entitled."

It should also be noted that while the respondent contends that there has been no publication of sound recordings, despite the sale of large quantities of authorized editions, the logical extension of that which they do concede elsewhere leads to the conclusion that there is little weight to such an argument.

That is, the respondent admits as it must, that under the holdings of this Court in *Sears* and *Compco,* a State may not prohibit the *imitation* of sound recordings.[31] What the respondents fail to say, but what is the

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[30]..... F. Supp. ....., (S.D. Fla. 1972, No. 72-164-Civ-JE).

[31]The respondents state in their brief at pages 31-32:

> "Under existing law anyone . . . willing to incur the expense and take the risk may . . . produce a recorded performance of a musical composition—even one which 'sounds just like' another recorded performance of that musical composition."

This same alleged distinction was relied on by the Court in *Tape Industries Association of America (TIAA) v. Younger,* 360 F. Supp. 340, 350 (C.D. Cal. 1970), the case which the Court below held to be the basis for its decision (Petition for Certiorari, Appendices A and C). The Court there held:

> "*Sears* and *Compco* could cover and immunize the plaintiffs here only if they had copied and imitated the product—that is, if they had listened to the sounds performed and embodied on the records and then had expended the necessary sums to copy and imitate the sounds of their own tapes."

After the decision in *TIAA v. Younger,* the alleged distinction between permissible copying and impermissible copying became

only logical conclusion, is that the reason a State may not protect against imitation of sound recordings under Title 17 U.S.C. § 2, is that said section does not apply because sound recordings have been published. Therefore protection against duplication or imitation, if desirable at all, must come from Congress, which body alone has the power to protect published works. Since Congress has consistently refused protection of any kind to pre-February 15, 1972, sound recordings, petitioners submit the states may not interfere.

The only possible reason for holding that the sale of copies of pre-February 15, 1972 sound recordings does not constitute a publication is that such sound recordings are not copyrightable and must be treated differently from items which are copyrightable. Such

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even more obscure. In *Sinatra v. Goodyear Tire & Rubber*, 435 F. 2d 711 (9th Cir. 1970) *cert. denied* 402 U.S. 906 (1971), a case arising under the diversity jurisdiction of the court, the plaintiff alleged that the defendant had copied her recorded performance of a particular musical composition, "These Boots Are Made For Walkin' "; that plaintiff had, through her recording, developed a secondary meaning in her performance; and that defendants by copying that performance were attempting to cause confusion in the minds of the public and were thereby "passing off" their performance as being that of plaintiff. The trial court entered summary judgment for defendant.

The Ninth Circuit, Court of Appeals, in an opinion written by one of the Judges in *TIAA v. Younger*, affirmed and held, *inter alia*, that the plaintiff's claim was barred by this Court's decision in *Sears* and *Compco*, reasoning:

> "[A]s Judge Hand pointed out in his dissent in *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657, 666-667 (2d Cir. 1955) to allow unfair competition protection where Congress has not given federal protection is in effect granting state copyright benefits without the federal limitations of time to permit definite public domain use." 435 F. 2d at 718.

Petitioners suggest that the reasoning of Judge Hand, accepted by the Court in *Sinatra v. Goodyear Tire & Rubber*, is equally applicable whether "imitation" or "duplication" is involved and whether the protection is based on unfair competition laws or criminal laws.

an argument ignores the strong public policy favoring a uniform national copyright law and the force of the Supremacy Clause. It would allow individual States to add to the list of copyrightable items in their State whatever items that particular State felt required protection notwithstanding that Congress had refused such items even the more limited protection of copyright.

This Court has recognized this problem and has rejected the argument that an item remains unpublished if it is not copyrightable.

> "An unpatented article, like an article in which a patent has expired, is in the public domain and may be made and sold by anyone who chooses to do so." *Sears, supra,* at 231.

Further in *Compco,* this Court held:

> "Today we have held, in *Sears, Roebuck & Company v. Stiffel and Company, supra,* that when an article is unprotected by patent or a copyright, state law may not forbid others to copy that article.[32] *Compco, supra,* at 237.

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[32]Recent Circuit Court decisions, based on *Sears* and *Compco,* have also rejected any argument that a State may grant protection to Constitutional "writings" if such writings are not patentable or copyrightable. For example, in *Tappan Co. v. General Motors Corp.,* 380 F. 2d 888, 892 (6th Cir. 1967) the Court noted there may be two reasons why an article is deprived of federal protection; either because the item "may not qualify for a patent or copyright at all" or because the alleged infringement "does not in fact impinge upon the plaintiff's rights." The Court then held:

> "To allow relief under State law in either situation would run counter to the paramount federal decision of nonprotection."

In another case, *Columbia Broadcasting System Inc. v. DeCosta,* 377 F. 2d 315 (1st Cir. 1967), *cert. den.* 389 U.S. 1007,

A clear statement of the reason for refusing to treat copyrightable and not copyrightable matters differently is found in Judge Learned Hand's opinion in *Fashion Originators Guild v. F.T.C.*:[33]

> "When in this country the Constitution (§8, Clause 8, Article I) gave to Congress power to 'secure' to authors the 'exclusive Right to their * * * Writings,' it was to be only 'for limited Times,' and did not allow a perpetual copyright. The purpose so disclosed is certainly inconsistent with the assumption that an author—notwithstanding publication and full enjoyment of his 'common law property'—might maintain his monopoly for 'unlimited Times.'
>
> ". . .
>
> "It would certainly be a strangely perverse anomaly that turned the grant of statutory copyright into a detriment to the 'author'; yet it would be hard to prove that the statutory remedies conferred made up for the limitation of the monop-

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the Court noted, with respect to copyrights:

> "Congress has established a procedural scheme of protection by notice and registration. The necessary implication of this approach, we conclude, is that, absent compliance with the scheme, the federal policy favoring free dissemination of intellectual creations prevails. Thus, if a 'writing' is within the scope of the constitutional clause, and Congress has not protected it, whether deliberately or by unexplained omissions, it can be freely copied." 377 F. 2d at 319.

In still another case, *Cable Vision, Inc. v. KUTV, Inc.*, 335 F. 2d 348 (9th Cir. 1964) *cert. denied*, 379 U.S. 989, another Circuit Court held that the decision as to whether there has been a publication does not turn on whether an item is copyrightable:

> "[T]he public domain was broadly delineated in *Sears:* that which is either not copyrighted, or copyrightable or on which the copyright has expired is in the public domain." 335 F. 2d at 350.

[33]114 F. 2d 80, 83 (2d Cir. 1940) aff'd 312 U.S. 457 (1941).

> oly. Omission of property from the act would be a bonanza to those who possessed property of that kind."[34]

The petitioners submit that the above demonstrates that the sale and full consequential exploitation of sound recordings constitute a publication; that since the sound recordings are not copyrighted, the performances embodied on them are in the public domain; and they may be copied freely, by anyone, in any manner. To rule otherwise would establish in favor of the record companies, at the expense of the petitioners and the general public, the exact "bonanza" feared by Judge Hand.[35]

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[34]It is interesting to note that Judge Hand's opinions, written well before *Sears* or *Compco*, consistently held that there was no room for State law controls over matters which, though "writings" within the meaning of Article I, Section 8, Clause 8 of the United States Constitution, had been given no copyright protection by Congress. Judge Hand so held in such cases as *G. Ricordi v. Haendler*, 194 F. 2d 914 (2d Cir. 1952); *Fashion Originators Guild v. F.T.C.*, 114 F. 2d 80 (2d Cir. 1940) aff'd, 312 U.S. 457 (1941); *Cheney Bros. v. Doris Eilk Corp.*, 35 F. 2d 279 (2d Cir. 1929) *cert. den.* 281 U.S. 728 (1930); and finally in his dissent in *Capitol Records v. Mercury Records Corp.*, 221 F. 2d 657 (2d Cir. 1955).

In the *Capitol Records* case Judge Hand would have held that State law may not prohibit the unlicensed copying (or duplication) of phonograph records, Judge Hand's dissent in that case has been referred to as "prophetic" in light of this Court's decisions in *Sears* and *Compco*. *CBS v. DeCosta*, 377 F. 2d 315, 319 (1st Cir. 1967).

[35]The respondent's argument against finding a publication rests on its contention that sound recordings should be treated in the same manner as live performances (Respondent's Brief at 15-16). However, as Professor Nimmer has pointed out (Nimmer, Copyright § 8.32 (1970)), live performances are not "Writings" within the meaning of Article I, Section 8, Clause 8 of the Constitution because there are no tangible copies of such live performances. Hence, live performances are not within an area which Congress has or may preempt, since the Constitution provides that Congress may protect only the "Writings" of authors. Cases concerning live performances are therefore inapposite.

D. California Penal Code § 653h Seeks to Prohibit the "Copying" of Sound Recordings.

As petitioners have shown, Congress has consistently refused to grant copyright protection to sound recordings fixed or published prior to February 15, 1972; the decisions of this Court have consistently held that the force of the Supremacy Clause, the public policy favoring uniform national copyright laws and the strong public policy against monopolies, require that the States be prohibited from interfering with the right to copy whatever federal law leaves in the public domain;[36] and that sound recordings have been published and since they have not been copyrighted, the performances embodied on such sound recordings are in the public domain.

The only question remaining is whether the conduct California Penal Code § 653h attempts to prohibit (and the acts petitioners were convicted of doing) constitutes "copying."

Respondent argues that the tapes manufactured and sold by petitioners are not "copies" of the recorded performance in the same sense as the items involved in *Sears* and *Compco* were copies.[37] This argument of

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[36]Free competition is a matter of great public importance in the United States. The philosophy that free competition, without the artificial restraint of State conferred monopolies, results in the greatest material progress can be found in the following decision of the Court of Customs and Patent Appeals (*In re Deister Concentrator Co.*, 129 USPQ 314, 319 (1961)):

> "It is basic to our consideration, therefore, that the socio-economic policy supported by the general law is the encouragement of competition by all fair means, and that encompasses the right to copy, *very broadly interpreted*, except where copying is lawfully prevented by a copyright or patent." (Emphasis added.)

[37]Respondent's Brief at 16-21.

course avoids the real question of whether, even if they are not the same kind of "copies", there is any reason or policy which arises from such an alleged difference which requires a different result in the instant case than was reached in *Sears* and *Compco*.

The Court below (by its reliance on *Tape Industries Association of America v. Younger*[38]) and respondent argues that the copying involved in the instant case differs from the copying in *Sears* and *Compco* because here, the petitioners "appropriated" the work, effort and money spent by the record companies to produce their sound recordings. However, this argument must fail because a copier, no matter what method he uses to copy, always "appropriates" those exact items.

In *Sears* this Court held the appropriation of Stiffel's design of a pole lamp was permissible and could not be stopped by State law.[39] In so doing, this Court reasoned that such a holding was necessary because:

> "The judgment below . . . gave Stiffel the equivalent of a patent monopoly on its unpatented lamp. That was error. . . ." 376 U.S. at 233.

The judgment below in the instant case has given the record companies, at the least, the equivalent of a copyright monopoly in their uncopyrighted sound recordings. This too is error.

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[38]360 F. Supp. 340 (C.D. Cal. 1970)

[39]"An unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so. What Sears did was to copy Stiffel's *design*. . . . This it had every right to do under the federal patent laws. That Stiffel originated the pole lamp and made it popular is immaterial. 'Sharing in the goodwill of an article unprotected by patent or trademark is the exercise of a right possessed by all. . . .'" (Emphasis added.) (376 U.S. at 231.)

A clear expression of the petitioners' position is found in *International Tape Mfg. Assoc. v. Gerstein.*[40] In that case, the District Court held unconstitutional, and enjoined enforcement of a Florida statute almost identical to California Penal Code §653h. In so doing the Court reasoned:

> "[T]his Court . . . cannot accept the distinction drawn between physical appropriation and copying. If Sears had gone to a store and bought a Stiffel lamp, then made a mold thereof, using the mold for the production of Sears lamps, we would, in this Court's view, have been presented with a situation exactly analogous with *Tape Industries* [v. *Younger*]. If that situation had been presented to the *Sears* Court, the result in that case would probably not have been the least bit affected. The focus of both *Sears* and *Compco* was the artificial creation of patent or copyright protection afforded to unpatentable or uncopyrightable works, not the manner in which the works were reproduced. Although *Compco* permitted state regulation to eliminate confusion as to the source of the work, it did not permit states to prohibit individuals from reproducing work. Thus, to this Court's way of thinking, the California statute as construed by that Court did intrude upon the federal copyright policies by prohibiting the dissemination of works which could not be afforded copyright protection, and should have been held invalid."[41]

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[40]..... F. Supp. ..... (S.D. Fla. 1972, No. 72-164-Civ-JE).

[41]This view of *Sears* and *Compco* is supported by the reliance of this Court in *Sears* on *G. Ricordi and Co. v. Haendler,* 194

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Another clear expression of petitioners' position is set forth by Professor Melville B. Nimmer who writes

> "[I]t is difficult to see any substance in this asserted distinction between 'copying' and 'appropriation.' How does 'appropriation' in [so called] record piracy differ from 'copying' in *Sears* and *Compco?* In neither case is there an actual taking of the plaintiff's *tangible* work product. In each case there is a reproduction of the plaintiff's creative work. It is true that in the case of [so called] record piracy such reproduction is accomplished by mechanical means rather than via the human hand or ear, but why is that significant? Could any greater state law liability attach to the photographc reproduction of a Rembrandt (or other public domain painting) than would be true in the case of a free hand copying? If phonograph records were protected by statutory copyright, clearly such protection could prohibit reproduction by tape duplication or other mechanical

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F. 2d 914 (2d Cir. 1952). In *G. Ricordi*—the only case cited by this Court in support of its holding that a state may not prohibit the copying of an uncopyrighted article (376 U.S. at 233)—the copier made photographic copies of the plaintiff's books so that he could use a cheap offset method of printing to produce an identical book, which he then sold. This was not an "imitation" type of copying. Rather, it was the exact kind of copying proscribed by California Penal Code § 653h, as it can reasonably be said that petitioners were charged with and convicted of making "electronic photographs" of phonograph records.

Judge Learned Hand, writing for a unanimous court, held in *G. Ricordi* that whether the book could be protected was a question for federal law, not State law, and since the book was not copyrighted "the defendant was free to photograph and sell the plaintiff's book." (194 F. 2d at 916.) Further, the *G. Ricordi* court specifically overruled anything to the contrary in *Fonotipia Limited v. Bradley,* 171 Fed. 951 (1908), a District Court case which had prohibited the duplication of musical recordings as unfair competition under State law.

means. Assuming, then, the rationale of *Sears* and *Compco*, Congressional withholding of such copyright protection precludes state law liability for such reproduction." *Nimmer, Copyright,* at 18 (1971 Supplement).

E. There Are No Compelling Economic Reasons to Ignore Public Policy and Prior Precedent in Order to Allow the Establishment of a State Statutory Copyright in Sound Recordings.

Petitioners have shown that if California Penal Code § 653h is allowed to stand the state will have created a monopoly in favor of record companies with respect to pre-February 15, 1972 sound recordings which is even greater than the copyright monopoly created by Congress (Public Law 92-140) for post-February 15, 1972 sound recordings. Such a monopoly created by one state in favor of one of its favorite enterprises, to the determent of interstate commerce and the general consumer, is not compatible with the goal of a uniform national copyright law, as announced in *Sears* and *Compco*.[42]

However, an argument is sometimes advanced that record copiers must be stopped at any cost because they "skim off the cream" of the profits from sound recordings and therefore they do not, in the long run, benefit consumers.[43]

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[42]The position of the tape copiers with respect to the current monopoly aspects of the recording industry is set out at Hearings on § 646 and H.R. 6927, House of Representatives, Committee on the Judiciary, Subcommittee No. 3, 92nd Cong., 1st Sess. (1971) at pages 82-114.

[43]This argument, often advanced by the record companies, apparently persuaded Congress to enact PL 92-140 which grants limited, experimental, copyright protection for sound recordings.

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This exact argument could, of course, be made in any copying case, including both *Sears* and *Compco*, because the copiers invariably copy that which has demonstrated itself to be a commercial success. The argument was rejected in *Sears* and *Compco*, however, because the Court recognized that copyright laws and patent laws are not meant to protect investment capital. Rather, such laws, though meant to encourage "authors" and inventors, are primarily designed to protect the general public.[44] Congress alone has the Constitutional directive and ability to determine what kinds of inducements, if any, are needed to encourage such authors and inventors without unduly jeopardizing the rights of the general consuming public.[45]

However, it has no real validity with respect to sound recordings already published. As to such recordings, the economic question simply is whether the record companies are to be allowed to reap a windfall, at the expense of the consumer, on older recordings because one or more States want to grant additional rewards to the venture capital invested by one of their favorite industries.

Further, and equally important, Congress has indicated that it desires to review again the question of copyrights for sound recordings to determine if they are needed, and if so, in what form. Thus, the House Committee report which accompanied what is now PL 92-140 noted:

> "The purpose of the amendment is to provide a period for further consideration of various alternatives for solving the problems in this area, before resorting to permanent legislative enactment", House Report No. 92-487, U.S. Code Congressional and Administrative News, 92 Cong., 1st Sess. 1971 (Vol. 2), p. 1567.

Petitioners suggest that if such a desire for a period of "further consideration" is to be respected, the states must be prohibited from enacting their own individual versions of the "correct" solution.

[44]In *Mazer v. Stein*, 347 U.S. 201, 219 (1954) this Court held:

> "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."

[45]The question of whether copyright is needed at all, and if so for how long, is the topic of a scholarly work by Harvard Law School Professor Stephen Breyer. (Breyer, *The Uneasy Case*

Conclusion.

The judgment of the Court below, affirming petitioners' conviction, and upholding California Penal Code § 653h, is contrary to the Constitution and the implementing Federal Copyright laws and should be reserved.

Respectfully submitted,

ARTHUR LEEDS,
PAUL T. LOCKE,
DANIEL M. GOTTLIEB,
By ARTHUR LEEDS,
Attorneys for Petitioners.

GOTTLIEB, LOCKE & LEEDS,
Of Counsel.

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for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281 (1970).) Breyer's analyses and conclusions with respect to books, long thought to be a proper subject of copyright, would appear to apply with even greater force to sound recordings fixed or published prior to February 15, 1972, since such recordings have continually been denied federal copyright protection.

Breyer concludes (at page 351) that, "To demonstrate that an initial publisher's costs are high, while reproduction costs are low, is not sufficient to establish the need for copyright protection." He also points out that copyright is "very much of a mixed blessing" since it can lead to monopoly abuses. Finally, he concludes:

> "[T]he desirability of copyright protection will vary from one type of 'writing' to another. One must know facts about the particular industry involved before one can accurately weigh the various costs and benefits associated with copyright protection."

Petitioner submits that Breyer's reasoning, as applied to sound recordings, dictates that Congress alone is the appropriate form to decide the merits and scope of copyright protection for sound recordings. The states must not be allowed to substitute their individual judgments for that of the Congress.